

## II

*(Acts whose publication is not obligatory)*

## COMMISSION

## COMMISSION DECISION

of 25 March 1992

relating to a proceeding pursuant to Article 85 of the EEC Treaty

(IV/30.717-A — Eurocheque : Helsinki Agreement)

(Only the French text is authentic)

(92/212/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Whereas :

Having regard to the Treaty establishing the European Economic Community,

## I. THE FACTS

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty<sup>(1)</sup>, as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 4 (1) and 15 (2) thereof,

(1) This Decision concerns an agreement entitled 'accord entre les institutions financières françaises et l'assemblée Eurocheque sur l'acceptation par les commerçants en France des eurochèques tirés sur des institutions financières étrangères selon les principes arrêtés lors de la réunion de l'assemblée Eurocheque tenue à Helsinki les 19 et 20 mai 1983' (Agreement between the French financial institutions and the Eurocheque Assembly on the acceptance by traders in France of Eurocheque drawn on foreign financial institutions in accordance with the principles adopted at the meeting of the Eurocheque Assembly held in Helsinki on 19 and 20 May 1983). The agreement, which was included in Chapter E of the Eurocheque manual, was in force for nearly seven-and-a-half years, from 1 December 1983, the date of its entry into force, until 27 May 1991, the date on which the Groupement des cartes bancaires 'CB', which represents the French financial institutions within the Eurocheque system, sent all its members a circular informing them that the Eurocheque General Assembly had, at its meeting on 9 and 10 May 1991, terminated the Agreement.

Having regard to the notification submitted on 16 July 1990 pursuant to Article 4 of Regulation No 17 by the Groupement des cartes bancaires 'CB' concerning an agreement concluded in Helsinki on 19 and 20 May 1983 between the Eurocheque Assembly and the French financial institutions on the conditions governing the acceptance of foreign Eurocheques in the trading sector in France,

Having regard to the Commission's decision on 19 July 1990 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection, in accordance with Article 19 (1) of Regulation No 17 and with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17<sup>(2)</sup>,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

## A. The parties

(1) *The Groupement des cartes bancaires 'CB'*

(2) A protocol was signed on 31 July 1984 between the 11 largest French financial institutions laying down the principle of interoperability between the three

<sup>(1)</sup> OJ No 13, 21. 2. 1962, p. 204/62.<sup>(2)</sup> OJ No 127, 20. 8. 1963, p. 2268/63.

card networks in France, namely the Carte bleue, Crédit agricole and Crédit mutuel networks. This principle of interoperability was given practical shape through the setting up, on 1 December 1984, of a 'groupement d'intérêt économique (economic interest grouping), the groupement des cartes bancaires 'CB' (hereinafter referred to as 'the Groupement'). Currently<sup>(1)</sup>, some 500 000 French traders are members of the card payment system of the Groupement and accept the CB card; on 31 December 1990, there were 19,5 million CB cardholders, with 7,9 million of the cards being for national use only and 11,6 million being also for international use (8 million Visa cards and 3,6 million Eurocards). In 1983, the year in which the Helsinki agreement was signed, the number of traders accepting the Carte bleue was 217 000<sup>(2)</sup>.

(3) The Groupement includes all the major French banks and financial institutions, namely, at the end of 1988<sup>(3)</sup>:

- the registered banks: more than 260 establishments included within the Association française des banques,
- the Crédit agricole: 91 regional banks,
- the Banques populaires: 31 regional banks,
- the Caisses d'épargne écureuil: some 300 local establishments,
- the Post Office (postal cheques),
- the Crédit mutuel: 20 regional federations,
- financial institutions.

(4) Since it was set up, the Groupement has acted as the French national Eurocheque community in place of the Association française des banques (AFB), as the Groupement pointed out in its notification of 16 July 1990: 'When it was set up in 1984, the Groupement took over the agreements concluded within Eurocheque. It has since then seen to the proper implementation of such agreements by its members and the traders affiliated to the CB network'.

## (2) Eurocheque International sc

(5) The Eurocheque organization was set up in 1968 on the private initiative of European financial institutions, with the aim of meeting the need for inter-

national payment systems resulting from the growth of tourism and business travel within Europe, by making available a means of payment which consumers may use both in their country of origin and in other countries.

(6) The Eurocheque system is open to all European credit institutions. It is based on two instruments: the Eurocheque and the Eurocheque card<sup>(4)</sup>. The drawee bank guarantees any payee bank reimbursement of a Eurocheque presented with the corresponding card, up to a predetermined maximum amount.

(7) Eurocheque International was originally a *de facto* association, without legal personality. On 3 February 1988, Eurocheque International adopted the form of a cooperative society of unlimited duration under Belgian law, with its registered office in Brussels and capital of Bfr 1 800 000 consisting of 18 shares of Bfr 100 000 subscribed by:

- Association of Swedish Banks,
- Associazione Bancaria Italiana,
- Groupement des cartes bancaires 'CB' (France),
- Comunidade Portuguesa eurocheque,
- Bank of Cyprus,
- Caisse d'épargne de l'Etat du grand-duché de Luxembourg,
- Agrupació Andorrana Eurocheque,
- PBS-Pengeinstitutternes BetalingsSystemer (Denmark),
- Apacs (United Kingdom),
- Telekurs (Switzerland),
- Suomen Pankkiyhdistys (Finland),
- Association of Norwegian Banks,
- Stichting Bevordering Chequeverkeer (Netherlands),
- Irish Clearing House,
- Jugobanka United Bank (Yugoslavia),
- Association of Austrian Banks and Bankers,
- Eurocheque Belgique sc,
- GZS-Gesellschaft für Zahlungssysteme GmbH (Germany).

(4) For the purposes of this Decision, the Eurocheque card is a 'guarantee card' and not an electronic payment card, as defined by the Commission in its recommendation 87/598/EEC on a European Code of Conduct (OJ No L 365, 24. 12. 1987, p. 72) and in its recommendation 88/590/EEC concerning payment systems, and in particular the relationship between cardholder and card issuer (OJ No L 317, 24. 11. 1988, p. 55).

(1) Source: CB Actualité No 14 — June 1991, p. 16.

(2) Source: Report by the Association française des banques for 1985, Annex V, p. 60.

(3) Source: Brochure entitled *Un système commun au service de chacun*, Groupement des cartes bancaires 'CB', December 1988.

**B. The relevant markets**

(8) The relevant market is that for Eurocheques drawn abroad, and more specifically that for Eurocheques made out in French francs to the 500 000 French traders belonging to the card payment system of Groupeement by holders of Eurocheque cards not issued by banks established in France and, secondarily, that for all international means of payment to French traders.

Outside the European Community, the main issuing countries are Austria (2 320 000 cards) and Switzerland (1 676 059 cards).

*(1) Potential drawers of foreign Eurocheques in France*

(9) In 1988 (1), 8 000 banks in 21 countries (including all the Member States except Greece and Italy) issued uniform Eurocheques, and almost all the banks, with 220 000 agencies in 40 countries (in Europe and most of the countries on the Mediterranean rim) accepted them. In all 44,4 million cards were issued in 1988 (34,5 million uniform cards and 9,9 million non-uniform cards). More than 5 million traders in 30 countries accept Eurocheques. In 1988, 50 million Eurocheques were made out abroad in local currency, involving a total amount of ECU 6,7 billion, i.e. an average of ECU 134 per Eurocheque drawn.

(10) Of the more than 37,1 million uniform Eurocheque cards issued in 1989 (2), more than 33 million were issued in Member States of the European Community :

— Belgium :	3 210 000,
— Denmark :	217 185,
— Germany :	23 300 000,
— Greece :	—,
— Spain :	10 000,
— France :	98 657,
— Ireland :	99 289,
— Italy :	600 000,
— Luxembourg :	147 400,
— Netherlands :	3 405 939,
— Portugal :	130 038,
— United Kingdom :	1 820 563.

(1) Source : *Eurocheque News* No 14, March 1989.

(2) Source : Brochure *Eurocheque 1989-1990*.

(11) All Eurocheque cardholders having an account in a bank not situated in France are potential drawers of Eurocheques in France in the banking or trading sector, the trading sector being the only one taken into account in this Decision. Thus, there were 37 million foreign holders of Eurocheque cards who were in 1989 potential drawers of Eurocheques in France, 33 million of these being nationals of other Member States.

(12) For the purposes of comparison, the number of French holders of Eurocheque cards and the number of holders of CB cards were as follows in the period from 1984 to 1990 (3) :

Year	Eurocheque cards	'CB' bank cards
1984	80 000	13 300 000 (1)
1985	271 800	14 000 000
1986	147 296	14 800 000
1987	137 000	16 300 000
1988	150 000	17 300 000
1989	98 657	18 700 000
1990	86 426	19 500 000

(1) Total number of cards issued by the Groupeement Carte bleue, the Crédit mutuel and the Crédit agricole.

(13) Apart from Eurocheque cards, the number of holders of the main international payment cards (credit or debit cards) (4) in the European Community was as follows at the end of 1988 (5) :

*(3) Source :*

- for 1984 to 1989 (except for the number of Eurocheque cards for 1989) : the Groupeement, hearing held on 28 November 1990,
- for 1990 : Eurocheque cards : reply made by the Groupeement on 12 July 1991 to the supplementary Statement of Objections of 19 June 1991.

(4) For the concept of payment card, see recommendations 87/598/EEC and 88/590/EEC.

(5) Source : Study on credit cards carried out at the Commission's request by the European Bureau of Consumers' Unions (BEUC), August 1989. There are no data available for Greece, Italy, Luxembourg and Portugal.

Cards	Belgium	Denmark	Germany	Spain	France	Ireland	Netherlands	United Kingdom
Eurocard/Access	192 400	130 000	850 000		1 500 000	190 000	180 000	12 200 000
Visa	160 000		220 000	6 000 000	6 000 000	280 000	65 000	15 400 000
American Express	130 000		600 000	230 000	360 000	30 000	155 000	1 000 000
Diners Club	115 000	85 000	320 000	110 000	142 000	14 000	80 000	300 000
Total	597 400	215 000	1 990 000	6 340 000	8 002 000	514 000	480 000	28 900 000

These figures show that competition between payments by Eurocheque and payments by credit or debit card is limited for practical reasons: the situation differs from one Member State to another, since many users of Eurocheques do not have credit or debit cards available to them and *vice versa*. In particular, as regards persons from other Member States spending some time in France, it is quite evident that the great majority of Germans have only Eurocheques available to them (23 million holders of Eurocheques as against 2 million holders of credit or debit cards). To a lesser degree, but still in large measure, the same applies to the Dutch (3,4 million holders of Eurocheques as against 0,5 million holders of credit or debit cards) and to the Belgians (3,2 million as against 0,6 million). By contrast, the British hold credit or debit cards in much greater numbers (29 million) than Eurocheques (1,8 million), as do the Spanish

(6,3 million as against 10 000) and, to a lesser extent, the Irish (0,5 million as against 0,1).

#### (2) Foreign Eurocheques drawn in France

- (14) As may be seen from the two tables set out below ('), France is the leading country accepting Eurocheques, with a total of 6 430 832 foreign Eurocheques drawn in France in 1989, equivalent to 15 % of all Eurocheques drawn abroad that year. More than 85 % of the Eurocheques drawn in France are made out by nationals of other Member States, mainly Germans (36 % of the total number of Eurocheques drawn in France), Belgians (17 %), Dutch (15 %) and British (15 %).

(') Source: Letter sent by Eurocheque International to the Commission on 18 May 1990.

**Number of international uniform Eurocheques drawn within the European Community in 1989**

Drawn in	Drawn by										Total	
	Belgium	Denmark	Germany	Greece	Spain	France	Ireland	Italy	Luxembourg	Netherlands	Portugal	
Belgium	—	6 844	342 542	—	—	66 041	5 844	118	242 072	963 084	3 167	101 202
Denmark	11 821	—	472 424	—	—	422	1 164	112	2 660	45 052	543	23 565
Germany	406 529	131 609	—	—	—	176 259	16 112	1 829	162 600	2 697 668	4 600	415 710
Greece	86 854	65 349	1 088 046	—	—	2 601	6 597	772	6 379	229 335	792	191 736
Spain	456 092	94 915	3 127 468	—	—	20 832	39 439	1 357	24 735	53 149	30 092	855 136
France	1 093 671	92 532	2 307 098	—	—	—	42 841	1 738	98 776	986 643	12 533	981 453
Ireland	9 978	1 701	94 392	—	—	—	568	—	1 625	18 337	192	131 905
Italy	227 898	70 646	2 799 560	—	—	—	32 532	13 716	—	33 005	231 013	5 773
Luxembourg	262 345	3 020	91 677	—	—	—	61 900	549	18	—	109 346	316
Netherlands	418 172	14 071	1 244 498	—	—	—	1 715	7 131	357	13 076	—	2 527
Portugal	55 315	19 249	267 377	—	—	—	5 738	12 438	167	9 986	103 457	—
United Kingdom	139 679	37 672	897 604	—	—	—	5 641	168 789	736	11 086	291 946	12 070
Total	3 168 354	537 608	12 732 686	—	—	374 249	314 620	7 329	606 000	6 207 030	72 605	3 284 371
												27 304 852

Classification of the ten leading countries, EEC and non-EEC, in terms of numbers of foreign Eurocheques accepted and drawn in 1989

(Total number of foreign Eurocheques drawn in 1989 : 42 140 887)

Rank	Accepting countries				Drawing countries			
	Country	Number of Eurocheques	%	Cumulative %	Country	Number of Eurocheques	%	Cumulative %
1	France	6 430 832	15,2	15,2	Germany	20 106 545	47,7	47,7
2	Spain	5 606 401	13,3	28,5	Netherlands	7 601 007	18	65,7
3	Austria	5 553 712	13,2	41,7	United Kingdom	3 818 227	9	74,7
4	Germany	5 356 978	12,7	54,4	Belgium	3 535 793	8,4	83,1
5	Italy	4 492 630	10,6	65	Switzerland	2 511 476	6	89,1
6	Switzerland	2 038 019	4,8	69,8	Austria	2 091 429	5	94,1
7	Netherlands	1 986 442	4,7	74,5	Denmark	677 763	1,6	95,7
8	Greece	1 940 022	4,6	79,1	Luxembourg	640 464	1,5	97,2
9	United Kingdom	1 875 376	4,4	83,5	France	420 664	1	98,2
10	Belgium	1 779 024	4,2	87,7	Ireland	337 178	0,8	99

- (15) The Groupement has, moreover, stated (<sup>1</sup>) that, of the 6,5 million foreign Eurocheques drawn in France, some one million were made out to traders and that this percentage of some 15 % of Eurocheques drawn in the trading sector in relation to the total number of Eurocheques is broadly similar from one country to another.

— the maximum amount of the interbank commission was raised,  
— and a minimum was introduced for the interbank commission.

### C. The Helsinki Agreement

- (16) The Helsinki Agreement runs totally counter to the Package Deal Agreement, which governs the use of Eurocheques abroad.

- (19) The main provisions of the package deal Agreement have already been outlined in Commission Decision 85/77/EEC. The Eurocheque system is based — or at least was based up to now — on the basic principle that the payee of a uniform Eurocheque drawn abroad in local currency — whether a trader or the drawer himself wishing to withdraw cash from a bank — must receive the full amount of the Eurocheque. In their relationships with the drawers of Eurocheques, the banks are free to pass on or not to pass on all or part of the commissions paid to the foreign banks and to the clearing houses, and possibly to charge a commission for their own account.

#### (1) *The Eurocheque system: the package deal Agreement*

- (17) The package deal Agreement was concluded on 31 October 1980 within the Eurocheque community and was put into effect from 1 May 1981. It was notified to the Commission on 7 July 1982 by the national banking groups making up the Eurocheque community. It was granted exemption by Commission Decision 85/77/EEC (<sup>2</sup>). The exemption ended on 30 April 1986, the date on which the initial Agreement expired. Pending a complete recasting of the Agreement, as was envisaged at that time within Eurocheque, a provisional comfort letter was sent to Eurocheque International on 10 July 1986, valid until 30 December 1987.

- (18) The new package deal Agreement was concluded at the Eurocheque Assembly held on 4 and 5 June 1987 and was notified to the Commission on 16 December 1987. Its full title is 'Agreement on the commissions, value dates and central clearing of uniform Eurocheques made out in local currency and the opening-up of the non-banking sector'. It has applied since 1 January 1988 for an indefinite period until the conclusion of a new agreement, which was to take place within two years. However, no new agreement was concluded during that period, and the 1987 Agreement continues to apply. The 1987 Agreement does not differ essentially from that which was covered by Commission Decision 85/77/EEC. Contrary to what may have been envisaged at one time, the system has not been substantially recast. However, two significant changes were made compared with the agreement exempted in 1984:

- (20) In the new 1987 Agreement, the maximum guaranteed amount remains the approximate equivalent value in local currency of Sfr 300, equivalent to some ECU 170. In France, it is currently FF 1 400. In addition, if they are to be dealt with in the Eurocheque international clearing system, Eurocheques must not exceed a certain amount, being the approximate equivalent in local currency of Sfr 600 (some ECU 340). In France, this amount is currently FF 2 500.

- (21) The maximum amount of the interbank commission paid to the foreign bank of the payee of the Eurocheque by the drawee bank was set at 1,25 % in the agreement exempted in 1984. At its extraordinary meeting held on 24 April 1986, the Eurocheque Assembly decided to increase this maximum to 1,60 % from 1 June 1986 to 31 December 1987. This increase, which was then temporary, was extended in the new agreement concluded on 5 June 1987 with effect from 1 January 1988.

- (22) The new 1987 agreement also introduced a minimum amount for the interbank commission, having the approximate equivalent value of Sfr 2 (around ECU 1,10) per Eurocheque, which thus applies to Eurocheques drawn in France for an amount of less than some FF 500.

#### (2) *The Helsinki agreement*

- (23) During the proceedings leading up to Decision 85/77/EEC, the Commission, on 19 September 1984, sent the AFB, which was then acting as the national Eurocheque community for France, a request for information following a complaint rela-

(<sup>1</sup>) In its reply of 29 October 1990 to the Statement of Objections and at the hearing held on 28 November 1990.

(<sup>2</sup>) OJ No L 35, 7. 2. 1985, p. 43.

ting to the conditions governing the collection in France of a Eurocheque drawn on a foreign bank. The AFB replied, by letter dated 17 October 1984, that, although the French banks had acceded to the package deal Agreement as regards cash withdrawals by foreigners at bank counters in France, they had not agreed to the provisions regarding:

- the acceptance of foreign Eurocheques in the trading sector in France,
- the paying-in of foreign Eurocheques by (French) individuals for collection by French banks.

However, this reply by the AFB is at variance with the notification on 7 July 1982 by Eurocheque International, on behalf of all the members of the Eurocheque Assembly (to which the AFB belonged), of the package deal Agreement, which covered the 'opening-up of the non-banking sector'. Nowhere in the notification was it stated that a national Eurocheque community had only partially acceded to the package deal Agreement.

The AFB also stated that 'the French banks which are members of the Groupement Carte bleue have agreed, on an experimental basis, to open up their trader network to foreign Eurocheques on the same terms as to customers who are Carte bleue or Visa card holders. This agreement, which covers almost 300 000 traders in France, falls outside the package deal'.

In recital 22 of Decision 85/77/BEC, the Commission made reference to this situation, which had been presented to it as being 'on an experimental basis'.

- (24) In 1988, in response to various complaints received following Decision 85/77/EEC, the Commission sent requests for information to various French credit institutions. One of these replied, in greater detail than the AFB had done in 1984, that: 'The treatment of payment by Eurocheque in the same way as payment guaranteed by a card derives from a decision taken in Helsinki on 19 and 20 May 1983 at the Eurocheque Assembly'.
- (25) In a request for information which it sent on 11 April 1989, the Commission requested Eurocheque International to send it the text of the agreement. Eurocheque replied initially, on 7 June 1989, that

'in accordance with the by-laws in force in the Eurocheque system, the Assembly is the highest-level body of the community. Decisions are taken by it and recorded in minutes. The principles of the internal agreement between the French financial institutions and the Eurocheque Assembly were adopted at the Assembly's meeting held in Helsinki on 19 and 20 May 1983 and were not, therefore, set out in a formal document signed by the parties concerned'.

Subsequently, in a supplementary reply sent on 17 August 1989, Eurocheque International finally sent the text of the agreement, when pressed to do so by the Commission.

- (26) The Agreement is entitled 'Agreement between the French financial institutions and the Eurocheque Assembly on the acceptance by traders in France of Eurocheques drawn on foreign financial institutions in accordance with the principles adopted at the meeting of the Eurocheque Assembly held in Helsinki on 19 and 20 May 1983'. Under the Agreement, which was included in Chapter E of the Eurocheque manual, the French banks and financial institutions agreed with the Eurocheque International Community that traders affiliated to the Groupement Carte bleue and/or to Eurocard France SA would, as from 1 December 1983, accept foreign Eurocheques made out in French francs for the payment of goods and services, on the terms as those of the abovementioned organizations.

The Agreement includes in particular the following provisions:

- in respect of purchases paid for by Eurocheques, the members of the Groupement Carte bleue and of Eurocard will charge their affiliated traders a commission which may not be greater than that applicable to payments by Carte bleue and Eurocard payments (').
- The banks which are members of the Groupement Carte bleue and of Eurocard will ensure that their affiliated traders do not increase the price of purchases paid for by Eurocheque, even in the case of special offers or sales.

(') The present standard contract used by the Groupement with retailers applies to payments made by CB cards, Visa Cards, and Eurocard/Mastercard.

- If the affiliated trader contravenes the principles set out above, the French banks and financial institutions will take action as soon as possible so as to ensure that they are complied with in future. Where the commission charged has been passed on to the holder of the foreign Eurocheque, the French banks and financial institutions will retrocede the amount to the issuing bank. Where there is recurrence of breaches of the principles, the French banks and financial institutions will adopt identical sanctions to those imposed in respect of Carte bleue or Eurocard in the same circumstances.
- During the clearing of foreign Eurocheques drawn in France and in accordance with the provisions of the package deal Agreement, a commission of 1,25 % of the amount of all the abovementioned cheques will be added and charged via the national clearing houses'.

It was also provided, in point 8 of the Agreement, that, before the end of 1984, the position regarding charges would be reviewed. In practice, it does not appear that any such review was carried out at the end of a year, and the Agreement continued to apply unchanged until May 1991, the only difference being that it was longer a 1,25 % commission that was charged in accordance with the package deal Agreement, but a 1,60 % commission with a minimum amount of Sfr 2.

- (27) Since 1985, it has in practice been the traders affiliated to the Groupement who have been affected by the Agreement, since, following the signature of the Helsinki Agreement, the card networks were made interoperable, resulting in the setting-up of the Groupement, which has since then acted as the national Eurocheque community for France and represents the French financial community within Eurocheque international sc.
- (28) Since the conclusion of the Agreement in 1983, another change of relative importance, at least in theory, with regard to its scope took place when the 'conseil de direction' of the Groupement adopted, on 25 October 1985, a directive under which the uniform rate of the commission hitherto charged to traders by the members of the Groupement in respect of all payments by the CB card was abandoned.
- (29) Parallel to the Helsinki Agreement, the protocol of 31 July 1984 (referred to in recital 2 above) included a clause under which 'as from 1 July 1986, the uniform Eurocheque will no longer be issued with a free-of-charge guarantee of payment in France ; it may continue to be issued only for

use abroad'. The French Conseil de la concurrence, in its decision No 88-D-37 of 11 October 1988 (¹), called on the Groupement to abolish this clause before 31 December 1989.

#### D. The proceedings

##### (1) *The initial Statement of Objections*

- (30) Both the use which was made of the initial package deal Agreement following Decision 85/77/EEC and the changes which were made to the text of the agreement following the exemption prompted the Commission, on 31 July 1990, to send Eurocheque International a Statement of Objections, which also included the Helsinki Agreement. A Statement of Objections which covered only the Helsinki Agreement was simultaneously sent, on the same day, to the Groupement.

- (31) The Statement of Objections sent to Eurocheque International with regard to the package deal Agreement and the way in which it had been applied related to :

##### — the lack of information :

in particular, Eurocheque was charged with not having complied with the obligation imposed under Decision 85/77/EEC regarding the detailed ex-post information to be provided to drawers of Eurocheques,

##### — charges :

with regard to the interbank commission, Eurocheque was charged, firstly, with the systematic application by all the system's members of the maximum amount of 1,60 % and, secondly, with the introduction of a minimum amount of Sfr 2 for the interbank commission ; in addition, Eurocheque was charged with the fact that this, in practice, uniform interbank commission was consistently and systematically passed on in full to customers, i.e. to the drawers of the Eurocheques,

##### — the limits imposed on the use of Eurocheques :

although exempted in 1984, the uniform setting of the maximum guaranteed amounts and maximum clearing amounts was, after detailed re-examination, criticized by the Commission.

(¹) Bulletin Officiel de la Concurrence de la Consommation et de la Répression des Fraudes, 15 October 1988, p. 271.

- (32) The objections stated to Eurocheque International and the Groupement in respect of the Helsinki Agreement related to the fact that this was clearly a price-fixing agreement, applicable moreover in relations between banks and customers and not only in interbank relations, since, through the Agreement, the French banks decided, with the approval of the Eurocheque International community as a whole, to charge their trader customers a commission equal in amount to that which they charge them for payments made by bank card (French or foreign). In addition, the objection was made that the Agreement had the object and immediate effect in the trading sector of making any competition whatsoever impossible between Eurocheques (in principle free of charge to payees) and payments by card, which the French banks have on the whole opted for in preference to the Eurocheque system.
- (33) Eurocheque International replied to the Statement of Objections on 6 November 1990, disputing the correctness of its arguments. Following the hearing organized at Eurocheque International's request on 28 November 1990, discussions continued to take place with the Commission; during these, it became apparent that the focus was shifting to a major point which, hitherto, had not posed any problem, namely the fact that Eurocheques were free of charge to payees, an aspect which had been breached by the Helsinki Agreement. Eurocheque International, while not disputing that the system was originally founded on this basis, now felt that this principle should no longer be applied, whereas the Commission pointed out that it was on this essential aspect that Decision 85/77/EEC hinged and that this therefore called into question the renewal of the exemption, assuming that all the other points raised in the Statement of Objections were resolved.
- (34) With regard to the Helsinki Agreement, the arguments put forward by Eurocheque International and, in particular, by the Groupement in its reply of 29 October 1990 to the Statement of Objections of 31 July 1990, and at the hearing on 28 November 1990, consisted mainly in denying that the Agreement contained any obligation whatsoever to charge a commission and in asserting that, far from having been restrictive, the Agreement had, on the contrary, the object and effect of promoting the development of Eurocheques in France.
- (35) The Statements of Objections of 31 July 1990 concerning the Helsinki Agreement concentrated on the applicability of Article 85 (1), since, at the time when they were drawn up, the Helsinki Agreement had not been notified and therefore the question of the applicability of Article 85 (3) did not arise. However, this question was none the less discussed in the Statements of Objections, and the conclusion reached was that, even if the Helsinki Agreement had been notified, it could not have been exempted.
- (36) However, on 16 July 1990, the Groupement formally notified the Commission of the Helsinki Agreement. This notification took place five days after a meeting with Commission officials, during which the Commission officials had confirmed to the lawyers representing the Groupement that a Statement of Objections concerning the Helsinki Agreement had been drawn up and that its dispatch was probably imminent. The Statements of Objections of 31 July 1990 make reference to this precipitate notification of an agreement concluded seven years previously. The Groupement objected that the Statement of Objections that had been sent to it had not taken account of the notification and the arguments put forward therein.
- (37) The Commission therefore deemed it appropriate, so as to ensure absolute respect of the rights of the parties, to follow up the Statement of Objections sent to the Groupement on 31 July 1990 with a supplementary Statement of Objections relating to Article 85 (3).
- (2) *The supplementary Statement of Objections*
- (38) This second Statement of Objections, dated 19 June 1991, did not in substance alter the legal assessment made in the original Statement of Objections, but answered the arguments relating to Article 85 (3) put forward by the Groupement both in its notification and in its reply to the initial Statement of Objections and at the meeting, as well as in letters subsequently sent to the Commission on 7 February, 22 March and 22 May 1991.
- (39) The supplementary Statement of Objections relating to the notification of the Helsinki Agreement was sent only to the Groupement, since Eurocheque International sc had not been involved in the notification. However, a copy of the supplementary Statement of Objections was sent to Eurocheque International on 20 June 1991.

(40) In its abovementioned letter of 22 May 1991, the Groupement informed the Commission that 'as regards the abolition of the Helsinki Agreements, as you have probably been informed, the Eurocheque Assembly, taking note of the opposition of your staff, has decided to terminate them'. However, no mention was made of the date on which such abolition was to take effect. In a letter dated 5 June 1991, Eurocheque International informed the Commission that 'the Eurocheque Board meeting held in Shannon, Ireland on 9 and 10 May, [...] expressed its willingness to abolish this agreement in view of your repeated demands, notwithstanding its non anti-competitive nature'. Since the term 'willingness' is not exactly equivalent to the term 'decided' used by the Groupement, there was accordingly some ambiguity as to the abolition of the Helsinki Agreement.

(41) In its reply of 12 July 1991 to the supplementary Statement of Objections, the Groupement removed any ambiguity on this subject by attaching a circular sent on 27 May 1991 by the Chairman of the Groupement to all members, informing them that :

'The provisions challenged by the Commission are generally known as the "Helsinki Agreements" were the result of a decision taken by the Eurocheque General Assembly. The Assembly has just terminated them, at its meeting on 9 and 10 May 1991. The acceptance of Eurocheques is thus now totally independent of the financial terms which your institution applies in respect of the remittance of payments by "CB" bank cards'.

## II. LEGAL ASSESSMENT

### A. Article 85 (1)

#### (1) Undertakings and associations of undertakings

(42) The banks and other credit institutions members of the Groupement and of the other national banking groups participating in the Eurocheque system are undertakings within the meaning of Article 85 (1). Eurocheque International sc, the Groupement and the national banking groups of the other Member States holding shares in Eurocheque International sc are associations of undertakings within the meaning of Article 85 (1).

#### (2) Agreements between undertakings

(43) In its reply of 12 July 1991 to the supplementary Statement of Objections of 19 June 1991 the Groupement asserts that 'the Helsinki agreement [...] is not an agreement between French banks and the Eurocheque community. Its provisions stem from a resolution of the Eurocheque General Assembly. At all events, it is a decision binding on the whole Eurocheque community'.

(44) It should be pointed out, however, in this connection that the text which the Groupement notified to the Commission on 16 July 1990 is in fact entitled 'Agreement between the French financial institutions and the Eurocheque Assembly'. Although in its Annex to Form A/B of the notification the Groupement chooses to use the word 'modalities', not once does it say that the text is not an agreement; on the contrary, it uses the word 'agreement' several times. Concerning the grounds for the negative clearance requested, it is thus stated in point 5.1 (page 5 of the Annex) that 'the Groupement does not think that the notified agreement contains any restrictions of competition' and in point 5.2 (page 6) that 'the agreement appreciably increases competition', and again in point 6.1 (page 6) that 'thanks to this agreement, France has risen from a particularly modest position to a position of leader'.

(45) This being so, the Helsinki Agreement is without doubt an agreement within the meaning of Article 85 (1), the parties to which were, until it was abolished in May 1991, the Groupement and Eurocheque International sc, the Groupement itself having indicated as such on Form A/B of the notification of the said Agreement.

#### (3) Restrictions of competition

(46) The Helsinki Agreement constitutes a particularly serious restriction of competition. Not only is it clearly a price-fixing agreement, but it is also applicable to relations with customers.

(47) In the first place, it is an agreement on the charging of a commission to customers, or more precisely an agreement whereby all French banks agree among themselves to bill their French trader customers affiliated to the payment system of the Groupement a commission equivalent to that which they charge them on payments effected by holders of 'CB' cards.

(48) In this connection, the Groupement has claimed throughout<sup>(1)</sup> that the agreement did not prescribe the charging of a commission. Eurocheque international, which commented on the Helsinki Agreement — both from the point of view of Article 85 (1) and from that of Article 85 (3) — only in its reply of 6 November 1990 to the Statement of Objections of 31 July 1990, subsequently leaving it to the Groupement to defend the Agreement, in particular at the hearing of 28 November 1990, likewise maintained<sup>(2)</sup> that the agreement in no way prescribed the charging of a commission. The wording of the Helsinki Agreement is, however, unequivocal in this respect, stipulating that 'members of the Groupement Carte bleue and of Eurocard shall charge their affiliated traders a commission'. It is therefore perfectly clear from the wording of the Helsinki agreement itself that it lays down the obligation to charge a commission. The Groupement also argued at the hearing that some French banks do not charge such a commission. Apart from the fact that only two examples were given, from which it can be deduced that almost all French banks charge a commission, an agreement on the charging of a commission does not cease to be restrictive of competition by virtue of the fact that not all the parties thereto, but only the vast majority of them, apply it. Moreover, Article 85 (1) is applicable not only to agreements which have as their effect the restriction of competition but also to those which have such a restriction as their object. The use of the words 'will charge' shows clearly that the object of the agreement was in fact to charge a commission on Eurocheques.

(49) The Helsinki agreement is also an agreement on the amount of commission charged. Point 3 of the agreement states that members will charge 'a commission which may not be greater than that applicable to payments by Carte bleue and Eurocard'. On the strength of this wording, the Groupement has repeatedly asserted that the Helsinki Agreement in no way constitutes such an agreement. This is contradicted, however, by at least two factors. Firstly, the opening lines of the agreement state that affiliated traders will accept foreign Eurocheques 'on the same terms' as those of the Groupement Carte bleue and Eurocard. At the time of signature of the agreement, and up until October 1985, those terms were uniform. The second factor, which bears out the first, is the abovementioned

<sup>(1)</sup> Both in the notification and in its reply to the original Statement of Objections, at the hearing and in its reply to the supplementary Statement of Objections.

<sup>(2)</sup> Points 61 and 99 of the reply to the Statement of Objections.

letter from the AFB dated 17 October 1984, in which it is once more stated that the network of French traders affiliated to the Groupement Carte bleue was open to foreign Eurocheques 'on the same terms' as those of Carte Bleue.

(50) Although the anti-competitive nature of the agreement was particularly serious at the time of its conclusion and up until 25 October 1985, the fact that as from that date the Groupement abolished the uniform rating hitherto applied to traders does not make the restriction of competition that the Helsinki agreement represents any less marked. That agreement has continued ever since to be an agreement on the principle of charging a commission: such an agreement is, by its very nature, restrictive of competition, as the Commission found in Decision 87/13/EEC, Association Belge des Banques<sup>(3)</sup>. Moreover, the Helsinki agreement continues to establish, if not for all traders as it did up until October 1985, then at least for each trader affiliated to the Groupement, an indissociable and altogether unjustified link between payment by card and payment by Eurocheque — two profoundly different means of payment. In the last analysis, the aim of the Helsinki agreement is to align the price of payment by Eurocheque for French traders on the price of payment by card. This had the effect of rendering the use of Eurocheques less attractive for French traders. Combined with the prohibition (referred to at recital 29) imposed by French banks on issuing Eurocheques for domestic use, this agreement has impeded the development of Eurocheques within France as a domestic means of payment.

(51) Compared with the Eurocheque system as exempted by the Commission in 1984, the Helsinki Agreement appears to be truly at variance with that system, which was based, *inter alia*, on the principle — which, as Eurocheque acknowledges, has contributed to its success — that the payee of a Eurocheque receives the amount thereof in full.

(52) The Groupement and Eurocheque International contend that the Commission was aware of the situation arising from the Helsinki agreement when it adopted Decision 85/77/EEC. It should be pointed out in this connection that the Helsinki Agreement, which was concluded in 1983, was not formally notified to the Commission until 1990 and that, despite repeated requests, the Commis-

<sup>(3)</sup> OJ No L 7, 9. 1. 1987, p. 27 (see recital 45).

sion was not sent a copy of the Agreement until August 1989. The Commission was therefore unable to assess the agreement for want of an exhaustive knowledge of it. Admittedly, the Commission did get to hear about the agreement from the AFB in October 1984, but the AFB described it as being 'experimental', and this had the effect of limiting the Commission's interest in gaining more detailed knowledge at that time of its precise terms. There is, incidentally, nothing in the Helsinki Agreement itself about its being experimental; all the Agreement says is that the position with regard to rating will be reviewed in a year's time.

(53) Of both more far-reaching and more fundamental importance is the fact that the reply from the AFB painted quite a different picture of the situation from that which the Commission had obtained from the notification of the package deal Agreement in July 1982 by Eurocheque International on behalf of all the national member groupings of the Eurocheque Assembly, of which the AFB was one. As its title indicates, the package deal agreement related specifically to the opening-up of the non-banking sector. There is therefore a contradiction, which may have partly escaped the Commission at the time, in claiming, as the AFB did in 1984, and as the Groupement continues to do in its reply to the supplementary Statement of Objections<sup>(1)</sup>, that French banks have not subscribed to the provisions concerning the acceptance of Eurocheques in trade in France.

(54) Eurocheque International and the Groupement have argued that the package deal Agreement rested in no way — or, at all events, no longer — on the basic principle according to which the payee of a Eurocheque must always receive the full amount thereof, and that therefore the Helsinki Agreement was in no way at variance with the Eurocheque system governed by the package deal Agreement.

(55) In spite of this, there can be no denying that, at the time of its conclusion, the Helsinki Agreement was at variance with the package deal Agreement, which was based, *inter alia*, on the principle that the Eurocheque is free of charge to its payee, the costs being borne by the drawer. Eurocheque International acknowledges this fact<sup>(2)</sup>. It was, moreover, one of the grounds for Decision 85/77/EEC<sup>(3)</sup>. It is not at all clear why a multilateral interbank agree-

ment would have been necessary if it was possible for the paying bank to collect a commission on foreign Eurocheques remitted to it for payment. The package deal Agreement was justified precisely because the paying bank received no remuneration from the remittance of the Eurocheque but rather received a commission from the issuing bank.

#### (4) Effect on trade between Member States

(56) An agreement like the Helsinki Agreement clearly has an effect on intra-Community trade as it concerns cheques drawn in a Member State by nationals of another Member State. The effect is particularly appreciable in the present case as France is the principal accepting country with nearly 6,5 million Eurocheques, of which 15 % in trade as a whole. Taking as a basis the abovementioned average of ECU 134 per Eurocheque, the annual amounts involved are, for all Eurocheques drawn in France, ECU 871 million, and, for Eurocheques drawn in the trading sector in France, ECU 134 million.

### B. Article 85 (3)

(57) The examination as to the applicability of Article 85 (3) does not, by definition, concern the application of the Helsinki agreement between 1 December 1983 and 16 July 1990 as, throughout that period, the agreement had not been notified. The question of the applicability of Article 85 (3) therefore arises only in respect of the period from 16 July 1990, the date of notification of the agreement, to 27 May 1991, the date of its abolition.

#### (1) Improvement of the services on offer

(58) In its notification, and in its subsequent submissions, the Groupement based the justification of the applicability of an exemption on the central argument that the Helsinki Agreement had as its object and as its effect the furthering of the development of Eurocheques in France. Thus, in the Groupement's view, the first of the four conditions set out in Article 85 (3), namely the improvement of distribution and the promotion of technical and economic progress, was fulfilled because 'thanks to this agreement, France has risen from a particularly modest position to a position of leader'.

(1) See the first paragraph on page 9: 'French banks have never approved of the extension of the package deal to the non-banking sector'.

(2) Record of the hearing of 28 November 1992, page 82, and letter to the Commission of 31 July 1991.

(3) See recitals 21 and 38.

- (59) Far from having as its object or effect the furthering of the development of Eurocheques in France, as claimed by the Groupement, the Helsinki agreement seems to have had as its object and as its effect the stunting of such development. It can be described as the second aspect of a mechanism set up by French banks to impede potential competition from Eurocheques, the other aspect being the provision in the protocol of 31 July 1984 setting up the Groupement which prohibited members of the Groupement from issuing Eurocheques for domestic use.
- (60) At the hearing of 28 November 1990 the Groupement argued, firstly, that the limited number of Eurocheques issued by French banks was an issue of fact and not the result of concerted practices, and, secondly, that, despite the abolition in 1988 of the restrictive provision in the 1984 protocol setting up the Groupement whereby French banks could issue Eurocheques only for use abroad (see recital 29 above), the number of Eurocheques issued by French banks fell in 1989 (see recital 12 above).
- (61) The figures which the Groupement furnished at the hearing show that this clause of the protocol had a lasting impact, contrary to what the Groupement stated at the hearing, where it claimed that it had been abolished in 1988 and that, despite that abolition, the number of French holders of Eurocheque cards had fallen in 1989. In fact, it was not until 31 December 1989 that the clause was deleted in response to an order by the French Conseil de la concurrence in its Decision No 88-D-37 of 11 October 1988, in which it is stated (Article 3 of the operative part) that: 'The Groupement is called upon to abolish before 31 December 1989 the stipulation in the protocol of 31 July 1984 to the effect that uniform Eurocheques will no longer be issued with a guarantee of payment in France and can continue to be issued only for use abroad'.
- (62) The claim made by the Groupement at the hearing that the provision in question had been abolished in 1988 and that that abolition had not prevented the number of French drawers of Eurocheques from decreasing in France in 1989 was therefore false. In the contrary, there is a direct link between the entry into force of the clause on 1 July 1986 and the fall in the number of French drawers of Eurocheques, which had increased appreciably in 1985.
- (63) In its reply to the supplementary Statement of Objections the Groupement did not offer any explanation for this surprising presentation of the facts at the hearing, pointing out instead that its argument was conformed by the facts as far as the 1990 figures were concerned.
- (64) This argument is not convincing; the figures show that Eurocheque cards issued by French banks enjoyed a period of success in 1985 and that that success was nipped in the bud by the entry into force of the provision in question the following year. It is not surprising that 1990 did not see the number of Eurocheque cards issued in France take off again, given the 50 % increase in the meantime in the number of bank cards issued: the objective of preventing the development of Eurocheques has been attained, and this situation now seems to be irreversible.
- (65) Like this clause in the 1984 protocol, abolished by the Groupement as from 31 December 1989 as a result of the intervention of the French Conseil de la concurrence, the Helsinki Agreement may be considered as having not only as its object but also as its effect the hampering of the development of Eurocheques in France by making French traders pay for a means of payment, the Eurocheque, which was in principle free of charge to them pursuant to the 1980 package deal Agreement. The anti-competitive object of the two provisions combined has been attained, judging by the annual rate of increase in the number of bank cards in France throughout the period during which the Helsinki Agreement was coupled with the provision in the Groupement's by-laws censured by the Conseil de la concurrence. The upshot is that at present nearly every French household has a bank card, 19,5 million CB cards having been issued in 1990, with the result that the risk to the Groupement of potential competition from Eurocheque in France has been virtually eliminated.
- (66) It is likewise wrong to claim, as the Groupement did in its notification, that the Helsinki Agreement has contributed to improving distribution and to promoting technical and economic progress because France is the leading acceptor of Eurocheques. Whilst it is true that it is in France that the largest number of foreign Eurocheques were drawn in 1989, the explanation cannot lie in the Helsinki Agreement as, according to the figures furnished by the Groupement, of the 6,5 million

Eurocheques drawn in France in 1989, the number of Eurocheques made out to traders was approximately 1 million. The Helsinki agreement, being concerned with only 15 % of the Eurocheques drawn — or even a slightly lower percentage as not all the French traders to whom foreign Eurocheques are made out are members of the Groupement's system of payment by card — cannot therefore in any way be the reason why France is the leading acceptor of Eurocheques. The reason is, rather, to be found in the number of tourists in France coming from the largest Eurocheque-drawing countries, whose ranking is given in the second table of recital 14, from which it can also be seen that France, which ranks first among accepting countries with 15 % of Eurocheques being drawn in France, ranks only ninth among Eurocheque-drawing countries, accounting for only 1 % of Eurocheques drawn abroad, which shows clearly that France is not, on the whole, a country which favours the Eurocheque system as do Germany and the Benelux countries.

the package deal Agreement. It is just as wrong to claim that the Helsinki Agreement afforded drawers the opportunity of withdrawing cash from 250 000 branches of the member banks of the Groupement: such an opportunity, if it did not previously exist, resulted from the 1980 package deal and not from the 1983 Helsinki Agreement, which concerned only the trading sector.

(69)

With regard to traders, it is clear that the Helsinki Agreement works entirely to their disadvantage as it means they have to pay a commission on each foreign Eurocheque they receive in payment, whereas, for traders in the other Member States, the Eurocheque is free of charge by virtue of the 1980 package deal. French traders are therefore the only traders in the Community who have to pay a specific commission on foreign Eurocheques. If it had not been for the Helsinki Agreement, French traders would, under the package deal Agreement, to which French banks were party, have had no commission to pay and might thus have tended to apply pressure on the French banking community to curb the development of payment by card — which, for its part, generates a commission payable by the trader — to the advantage of Eurocheques.

## (2) Benefits to users

(67) In the opinion of the Groupement, the second condition for the application of Article 85 (3), namely that of allowing users a fair share of the resulting benefit, is fulfilled as far as the two categories of user, i.e. holders and traders, are concerned, because the agreement 'has enabled foreign holders of Eurocheques to benefit from a reduction in the costs incurred through using their cheques' and that 'such foreign holders have been afforded considerable opportunities for using their Eurocheques as they have acquired instantaneously the possibility of withdrawing cash from more than 250 000 branches of the member banks of the Groupement and of effecting payments on the premises of more than 450 000 CB-affiliated traders'. As to traders, they have 'amply benefited from the acceptance of Eurocheques by the system of payment by card', and 'from the advertising targeted at foreign holders' by the Groupement.

(70)

The only category of users — if they could be described as such, but they are, rather, intermediaries in the case in point — to benefit from the Helsinki Agreement is made up of French banks, who are thus paid twice for the same service and are the only banks in the Community to be so remunerated: firstly by French traders, as a result of the Helsinki Agreement, and secondly by foreign banks (the banks of the drawers of Eurocheques), as a result of the package deal Agreement. The true users do not, for their part, derive any benefit from the Helsinki Agreement, which, on the contrary, works to their detriment, whether they be traders, who have to pay a commission when the Eurocheque should be free of charge to them, or whether they be drawers, who have difficulty in using their Eurocheques in France, either because traders refuse them precisely because of the commission they have to pay, or because they pass on the drawer the costs which they, as traders, have to pay to their bank.

(68) As far as the drawers of Eurocheques are concerned, to claim that the Agreement has enabled them to benefit from a reduction in the costs they incur is to forget that, under the terms of the 1980 package deal signed by the French banking community, holders were not to be billed for Eurocheques used abroad: if French banks charged holders a commission, either before or after the Helsinki Agreement, it was in violation of

## (3) Indispensable nature of the restrictions

(71)

According to the Groupement, the third condition of Article 85 (3), viz. the indispensable nature of the restrictions, is fulfilled because 'the system enables holders of Eurocheques to use them in France under the same conditions as in other member

countries of Eurocheque, and their banks to accept Eurocheques under the same conditions as bank cards', and also because the geographical situation of France requires that the use in France by tourists from northern Europe of their usual means of payment be facilitated.

(72) But it is not the Helsinki agreement that has enabled holders to use Eurocheques in France under the same conditions as in the other Member States : such was the purpose of the package deal Agreement. Were the indispensable nature claimed by the Groupement to consist in the fact that the Helsinki Agreement is the necessary precondition for applying the package deal Agreement in the trading sector in France, this reasoning is unacceptable as the package deal agreement was exempted in 1984 on the ground that Eurocheques were free of charge to their payees. It is therefore quite contradictory to describe the Helsinki Agreement, which constitutes a major derogation from the package deal Agreement, as a restriction which is indispensable to the attainment of the objectives of the package deal Agreement.

(73) The argument based on the geographical situation of France is equally untenable. Admittedly, there is a structural imbalance in the Eurocheque system in that the Eurocheque-drawing countries are countries of northern Europe (primarily Germany, which accounts for almost half the number of Eurocheques drawn abroad, then the Benelux and, to a lesser extent, the United Kingdom) whereas the accepting countries are above all countries of southern Europe owing to the flow of tourists from the north to the south. It should be pointed out in this connection, however, that France's geographical situation is no more special than that of Italy or Spain, whose banking sector has not considered it necessary to demand a Helsinki-type Agreement and makes do with the remuneration arrangements laid down in the package deal Agreement.

#### *(4) Scope for competition*

(74) The fourth condition of Article 85 (3), that of the non-elimination of all competition, is, according to the Groupement, fulfilled because the agreement 'has permitted the introduction in France of a new means of payment usable also by foreign holders' and that 'considerable competition continues to exist between the various international means of payment'.

(75) First of all, it should be pointed out once more that it is not the Helsinki Agreement that has enabled Eurocheques to be used in the trading sector in France, but the package deal Agreement, which expressly concerns, as its very title indicates, 'the opening-up of the non-banking sector' : there was no mention in the agreement notified to the Commission of France being excluded from this opening-up of the non-banking sector.

(76) As to the non-elimination of all competition, it can be assessed at several levels. The first is that of the directly relevant market, that is to say that of foreign Eurocheques drawn in the trading sector in France. At this level, it is clear that the Helsinki Agreement does result in the elimination of all competition as French banks agree not only to bill a commission to traders, contrary to the package deal Agreement itself, but also that that commission should be the same as that applied to payments by card.

(77) A secondary, alternative level at which to assess competition could be that of all international means of payment used by French traders. It has already been stated, however, in this connection (see recital 13) that competition between these various means of payment is generally limited for factual reasons. Admittedly, there is always the possibility of carrying cash on one's person. However, apart from the risks of loss or theft that this involves, the exchange costs, as has been shown by several studies by BEUC<sup>(1)</sup>, are particularly dissuasive. As for international credit or debit cards, the figures show that most holders of Eurocheques do not have such cards. Even when a Eurocheque holder has an international payment card, competition is totally eliminated at the level of the commission paid by the trader since those commissions, precisely because of the Helsinki Agreement, are the same whether payment is effected by a Eurocheque or by an international credit/debit card. As to cheques, the Eurocheque is virtually the only cheque in international use, apart from travellers' cheques or postal cheques, which are used above all for cash withdrawals and do not, therefore, compete with Eurocheques as a means of paying traders.

(1) See the study entitled 'Holiday money' of April 1991 carried out at the Commission's request by BEUC in conjunction with the Union fédérale des consommateurs and the magazine *Que choisir*.

### C. Article 15 (2) of Regulation No 17

(78) In view of the gravity (see recital 46 *et seq.*) and duration of the infringement, fines should be imposed both on the Groupement and on Eurocheque International in respect of the whole period prior to the notification. In calculating the amount of the fine the following factors have been taken into account.

#### (1) *The division of responsibility*

(79) The initiators of the infringement are the French banks, who therefore bear the main responsibility; the infringement was international on their part or due at least to their negligence. Eurocheque International nevertheless agreed, more or less willingly, to participate in the infringement, for which it therefore also bears an, albeit appreciably lesser, share of the responsibility and which it committed negligently, perhaps even intentionally.

#### (2) *The profit derived from the Agreement*

(80) The French banks derived a direct profit from the Helsinki Agreement while Eurocheque International did not. The annual gain for French banks in terms of commissions generated by the Helsinki Agreement can be estimated approximately on the basis of three elements. First the average amount of a Eurocheque is ECU 134 (see recital 9) but one can assume that, as occurs with payment cards, the average amount of the Eurocheques issued in retail outlets is less than the average amount of cheques issued at banks for cash, in which case the average amount to be taken into consideration would be a little less than ECU 134, say around ECU 100. Secondly the annual number of Eurocheques is approximately one million (see recital 15). Thirdly the average commission applied to Eurocheques is approximately 1 %. In total therefore the annual gain can be valued at approximately ECU 1 million.

(81) As the Agreement took effect on 1 December 1983 and was notified on 16 July 1990, the duration of the infringement is six-and-a-half years. In view of the fact that the number of Eurocheques made out each year to French traders must have been slightly smaller, before 1988, than the figure of 1 million for that year, it can be estimated that the Helsinki Agreement must have earned the French banking sector approximately ECU 5 million in commissions from traders. This is income deriving from an Agreement which is illegal by virtue of Article 85. The commissions paid by the retailers were added to the maximum interbank commissions of 1,6 %

paid by the banks of the Eurocheque drawers, as provided for in the package deal Agreement, exempted by the Commission in 1984 on the basis that the full amount of the Eurocheque should be paid to the payee.

#### (3) *Aggravating factors*

##### (a) *Indirect unquantifiable profit derived from the Agreement*

(82) This financial profit was not however the ultimate objective of the Helsinki Agreement: the French banks have never claimed that the Helsinki Agreement appeared necessary to them because the maximum remuneration provided for by the package deal Agreement would have been insufficient to cover their costs. The Helsinki Agreement had first and foremost, as its object — and has had as its effect — the prevention in France of the development of the competition that might otherwise have taken place between Eurocheques and bank cards. Moreover (as has been explained in recital 50) this Agreement, taken together with the provision in the protocol establishing the Groupement which prohibit French banks from issuing Eurocheques for national use, has impeded the development of Eurocheques in France.

(83) Although Eurocheque international did not derive any direct benefit from the Agreement it did nevertheless derive an indirect gain in the sense that this Agreement was the price which it had to pay — a particularly high price in terms of restrictions of competition and major derogation from the package deal Agreement — to continue to have access to the French retail market.

##### (b) *Lack of cooperation from the parties*

(84) Rather than reproaching the Commission for not having sought to gain a better insight into the situation in France, which was described in a few lines by the AFB, if a reproach has to be made in this respect, it should be directed more at Eurocheque International and at the French banking community for not having fully informed the Commission on their own initiative of the subtleties of the allegedly partial accessions to the package deal Agreement and of the situation arising from the Helsinki Agreement. If, at that time, the Commission's attention had been drawn (whereas it was the Commission itself that, following a complaint, sent a formal request for information to the French banks in an attempt to gain a better understanding of the situation) to the real significance of the

Helsinki Agreement, this full knowledge would without doubt have influenced the Commission's decision regarding the package deal Agreement itself. While it is true that, unlike under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings<sup>(1)</sup>, which provides for the compulsory notification of concentrations with a Community dimension, notification under Regulation 17/62 is optional, if an undertaking chooses to have recourse to it, it must collaborate fairly with the Commission, that is to say no important information must be withheld. This principle of fair and full notification stems from Articles 8 (3) (c) and 15 (1) (a) of Regulation No 17 and was confirmed by the Court of Justice in its preliminary ruling in Case 106/79 VBBB v. Eldi Records BV<sup>(2)</sup>. Moreover, in so far as the Helsinki Agreement made a considerable breach in the package deal Agreement, the question could arise whether, when the Commission announced in October 1983, through a notice in the Official Journal pursuant to Article 19 (3) of Regulation No 17, its intention of taking a favourable decision with respect to Eurocheque, the notification of the package deal Agreement could still, for want of having been supplemented by a notification of the Helsinki Agreement, be considered a 'fair and accurate' notification, as the Commission also stated in Decision 85/206/EEC, on aluminium imports from Eastern Europe<sup>(3)</sup>, especially if certain members of the Eurocheque system had acceded only partially to the package deal Agreement.

(87) Finally it was only in May 1991, i.e. one year after sending the Statement of Objections that the Agreement was finally abolished.

#### (4) *Mitigating factors*

(88) Although the abolition of the Agreement was belated it was nevertheless spontaneous in the sense that it was done before the adoption by the Commission of a prohibition decision.

(89) Besides the Commission could be criticized, as the parties have in fact done, for not having, at the end of 1984, sought to investigate more vigorously the scope and import of the Helsinki Agreement, the existence of which was mentioned by the French banks in a reply to a request for information, albeit in vague and inaccurate terms — the Agreement was presented as having been concluded on an 'experimental basis'.

(90) Finally since this is the first decision imposing fines in the banking sector a certain degree of clemency may be appropriate, at least in comparison with the seriousness of the infringement.

(91) In this case, the mitigating factors offset the aggravating factors,

HAS ADOPTED THIS DECISION :

#### *Article 1*

The Agreement which was concluded at the Eurocheque Assembly held in Helsinki on 19 and 20 May 1983 between the French financial institutions and the Eurocheque Assembly on the acceptance by traders in France of Eurocheques drawn on foreign financial institutions, and which was in force from 1 December 1983 to 27 May 1991, constituted an infringement of Article 85 (1) of the EEC Treaty.

#### *Article 2*

The request that the Agreement referred to in Article 1 be exempted pursuant to under Article 85 (3) of the EEC Treaty for the period from 16 July 1990, the date of its notification, to 27 May 1991, the date of its abolition, is hereby rejected.

#### *Article 3*

- (86) In addition the Groupement and Eurocheque have repeatedly given an incorrect interpretation of the Agreement by claiming that it did not contain an obligation to charge a commission.

(1) OJ No L 257, 21. 9. 1990, p. 13 (amended version).

(2) [1980] ECR 1137, paragraph 10.

(3) OJ No L 92, 3. 3. 1985, p. 1 (see recital 16.1.2).

1. A fine of ECU 5 000 000 is hereby imposed on the Groupement des cartes bancaires 'CB' and a fine of ECU 1 000 000 on Eurocheque International sc by reason of the infringement referred to in Article 1.

2. This amount shall be paid to the Commission of the European Communities within three months of the date of notification of this Decision into the following bank account : No 310-0933000-43, Banque Bruxelles Lambert, agence Européenne, rond-point Schuman 5, B-1040 Bruxelles.

On expiry of that period, interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ecu operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, i.e. 13,75 %.

3. Should payment be made in French francs by the Groupement des cartes bancaires 'CB' or in Belgian francs by Eurocheque International sc, the exchange rate applicable shall be that prevailing on the day preceding payment.

*Article 4*

This Decision is addressed to :

1. Groupement des Cartes Bancaires 'CB',  
29, rue de Lisbonne,  
F-75008 Paris,
2. Eurocheque International sc,  
avenue Louise 327, bte 1,  
B-1050 Brussels.

This Decision is enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 25 March 1992.

*For the Commission*

Leon BRITTAN

*Vice-President*